No. 02-1852

IN THE

Supreme Court of the United States

BRIAN OLANDER,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent State Farm Mutual Automobile Insurance Company is a mutual insurance corporation which is owned by its policyholders and has no publicly traded stock. Respondents State Farm Fire and Casualty Company, State Farm Life Insurance Company and State Farm General Insurance Company are wholly-owned by Respondent State Farm Mutual Automobile Insurance Company.

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REASONS FOR DENYING THE PETITION

I. THE CASE DOES NOT MEET THIS COURT'S STANDARDS FOR CERTIORARI.

Petitioner complains of the *grant* of rehearing by the United States Court of Appeals for the Eighth Circuit. Pursuant to its grant of rehearing, the Eighth Circuit has already proceeded to rehear the case, reverse the panel opinion and affirm the District Court's grant of summary judgment[1]. *See* Pet. App. B, p. 2a. Only after the rehearing produced an adverse result did Petitioner elect to complain of the decision to grant the rehearing.[2]

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1. The decisive substantive issue in the case is whether the Agent's Agreement between Petitioner and Respondents is terminable at will. The Agreement, which is of indefinite duration, provides, "You or State Farm have the right to terminate this Agreement by written notice delivered to the other or mailed to the other's last known address. . . ." *See* Pet. App. B, p. 3a. The reported decisions on the issue from other jurisdictions had held that the Agreement is terminable at will. *Mooney v. State Farm Insurance Companies*, 344 F. Supp. 697 (D.N.H. 1972); *Melnick v. State Farm Mutual Automobile Insurance Co.*, 749 P.2d 1105 (N.M.), *cert. denied*, 499 U.S. 822, 109 S. Ct. 67, 102 L. Ed. 2d 44 (1988); *Vitkauskas v. State Farm Mutual Automobile Insurance Company*, 157 Ill. App. 3d 317, 509 N.E.2d 1385 (Ill. App. 1987). The panel opinion here held to the contrary. *Olander v. State Farm Mutual Automobile Insurance Co.*, 278 F.3d 794 (8th Cir. 2002), *vacated*, 317 F.3d 807 (8th Cir. 2003). On August 13, 2003, a panel of the Ninth Circuit also held that the Agreement is terminable at will in *Appling v. State Farm Mutual Automobile Insurance Co.*, __ F.3d __, 2003 WL 21920905 (9th Cir.).

2. Thus, Respondents note that there is a question of this Court's jurisdiction under Rule 13. The Petition seeks review of the March 26, 2002 decision to grant the rehearing, Pet. App. A, p. 1a. Although the rehearing was granted in March 2002, the Petition was not filed until June 2003.

This Court grants review on a writ of certiorari sparingly and only for "compelling reasons". Rule 10. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* As the Court stated in dismissing as improvidently granted the writ in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93, 43 S. Ct. 422, 423 (U.S. 1923):

> If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

That remains the Court's approach today. Rule 10(a) articulates three standards which "indicate the character of the reasons the Court considers". Those are:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a

> lower court, as to call for an exercise of this Court's supervisory power;

Petitioner makes arguments under the first and third. The case satisfies neither.

A. Authority of the Courts of Appeal to Order Rehearings En Banc.

Section § 46(c) of Title 28 of the United States Code (Pet. App. C, p. 25a) empowers the courts of appeal to grant rehearings en banc. The statute is silent as to the circumstances in which the courts of appeal can, or should, exercise the power to rehear cases en banc. Congress could have articulated a standard but did not do so, thus leaving the way open for the Judicial Branch to craft rules for the exercise of the power.

Shortly after adoption of 28 U.S.C. § 46(c), this Court recognized in *Western Pacific Railway Corp. v. Western Pacific Railway Co.*, 345 U.S. 247, 73 S. Ct. 656, 97 L. Ed. 986 (1953) that 28 U.S.C. § 46(c) is a broad grant of both power and discretion to rehear cases:

> The statute deals not with rights but with powers. The manner in which that power is to be administered *is left to the court itself*. . . . Because § 46(c) is a grant of power, and nothing more, *each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised.*

345 U.S. at 259 (emphasis added). The Court reiterated the breadth of that discretion in *Shenker v. Baltimore & Ohio*

R.R. Co., 374 U.S. 1, 4, 83 S. Ct. 1667, 10 L. Ed. 2d 709 (1963) and *United States v. American-Foreign S.S. Co*, 363 U.S. 685, 80 S. Ct. 1336, 1339, 363 U.S. 685, 688, 4 L. Ed. 2d 1491 (1960) (citing *Western Railway, supra*).

In 1967, this Court adopted Rule 35, Fed. R. App. P. (Pet. App. D, p. 26a) That Rule establishes two broad criteria for the grant of a rehearing en banc: (1) maintenance of uniformity of the decisions of the circuit, and (2) questions of "exceptional importance". Rule 35(a)(1), (2), Fed. R. App. P. Although the Rule codified bases for the grant of rehearing, nothing in the text of the Rule or the accompanying Comments suggested that it was intended to limit the broad discretion granted by Congress and previously recognized by this Court in *Western Pacific* and *Shenker*.

B. The Eighth Circuit's Grant of Rehearing.

In their Petition for Rehearing (Pet. App. K, pp. 39a-40a, 50a-51a), Respondents made significant arguments on both grounds for rehearing under Rule 35(a). Concerning uniformity, a number of prior decisions of the Circuit, applying similar or identical rules of contract construction, had held that agreements with similar language were terminable at will. Defendants cited *Crowell v. Campbell Soup Co.*, 264 F.3d 756, 761 (8th Cir. 2001) (termination at will of contract for agricultural services), and *Martin v. Equitable Life Assurance Society*, 553 F.2d 573 (8th Cir. 1977) (finding of ambiguity in termination language reversed; contract held terminable at will)[3]. The panel opinion was in conflict with those.

3. The en banc Court identified a number of other decisions of the Eighth Circuit which had recognized that agreements of indefinite duration could be terminated at will. *Olander v. State Farm Mutual Automobile Insurance Co.*, 317 F.3d 807, 810 n.2. (8th Cir. 2003).

Petitioner's argument (Pet. at 5) to the contrary about those cases is taken directly from his opposition to Respondents' Petition for Rehearing (*see* Pet. App. L, p. 60a). The Eighth Circuit's en banc opinion (Pet. App. B, p. 5a) obviously disagreed with Petitioner's reading of those cases as a matter of law. Review of such a disagreement is not within Rule 10 of this Court.

Concerning the "exceptional importance" criterion of Rule 35(a)(2), Fed. R. App. P., Respondents noted (Pet. App. K, pp. 39a, 50a-51a) that there are several hundred State Farm agents in the Circuit whose contract relations may be affected by the opinion of the panel[4].

In its decision, the en banc Court succinctly stated its rationale for rehearing the case en banc. In full[5] that is as follows:

> Because this decision may affect countless State Farm agency relationships in the Eighth Circuit and nationwide and conflicts with a number of decisions by other courts construing the standard form State Farm agency contract, we granted State

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4. The panel opinion relied (278 F.3d at 797) on contract language anticipating a beneficial relationship as creating ambiguity. Respondents pointed out in their Petition for Rehearing (Pet. App. K, p. 44a) that that was directly contrary to North Dakota precedent in *Wadeson v. American Family Mutual Ins. Co.*, 343 N.W.2d 367, 371 (N.D. 1984) where the North Dakota Supreme Court held that similar assurances of a long career did not render termination at will language ambiguous.

5. In his quotation of the rationale (Pet. at 6), Petitioner omits critical language.

> Farm's petition for rehearing en banc and now affirm.[6]

317 F.3d at 809. That language indicates that the Court found that the issue satisfied the exceptional importance standard.[7]

Petitioner suggests that the case did not meet the exceptional importance standard because it involves North Dakota law. The Eighth Circuit obviously viewed the case as one of broader significance, as indicated by its language quoted immediately above[8]. That was a discretionary determination under *Western Railway, supra*. That does not qualify for review under Rule 10 of this Court.

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6. Respondents asserted additional bases for finding exceptional importance under Rule 35(a)(2), Fed. R. Civ. P. which the en banc Court did not incorporate into its opinion. *See* Pet. App. K, pp. 39a-40a, 50a-51a.

7. As mentioned in note 3 above, the en banc Court also identified at 317 F.3d at 810 n.2 a number of prior decisions of the Circuit, involving various types of contracts, with which the panel opinion was in conflict, thus furnishing a second basis for en banc review under Rule 35, Fed. R. App. P.

8. Because the case, which was originally filed by Petitioner in United States District Court, reached a United States Court of Appeals, any decision is destined to be cited repeatedly in contract termination cases throughout the country.

C. There is No Conflict Between Circuits on An Important Issue.

1. Petitioner Points to No Conflicting Case from Any Circuit.

Petitioner fails to point to conflicting cases from other circuits. *Brown v. Stites Concrete, Inc.*, 994 F.2d 553 (8th Cir. 1993) does not aid his argument. That case was also decided by the Eighth Circuit and therefore does not qualify as the decision of another court of appeals.

Also, the holding of *Brown* does not aid Petitioner. The Eighth Circuit held only that, where a suggestion of rehearing en banc is granted, the court of appeals reviews only the issues set out in the Suggestion as meriting rehearing; the court does not review the entire case. Nothing in *Brown* conflicts in any way with the decision to rehear Petitioner's case.

Nor is Petitioner's other cited case on the issue, *HM Holdings, Inc. v. Rankin*, 72 F.3d 562 (7th Cir. 1995), in conflict with the decision of the Eighth Circuit to rehear this case. In *HM Holdings*, the Seventh Circuit held that the petitioner for rehearing had failed even to attempt to conform to the requirements of that Court's Rule 40(c) for such petitions.[9] The *HM Holdings* decision was addressed to the unique circumstances of that petition and is no authority regarding the Eighth Circuit's disposition of Respondents' petition in this case.

9. The same cannot be said of Respondents' petition here. *See* Pet. App. K, pp. 38a-40a and 49a-51a where Respondents specifically articulated bases under Rule 35, Fed. R. Civ. P. for rehearing en banc.

2. Petitioner's Reliance on the Local Rules of Other Courts of Appeal Is Misplaced.

The local rules of other circuits are not decisions of those circuits.[10] By the language of Rule 10 of this Court, which focuses on decisions, differences among rules of the circuits do not constitute conflicts warranting grant of the writ of certiorari.

Moreover, some of the rules on which Petitioner relies are not inconsistent with the Eighth Circuit's grant of rehearing. For example, nothing in Third Circuit Rule 35.0 prohibits rehearing en banc of a state law issue. Third Circuit Internal Operating Procedure ("IOP") 9.3.3. (Pet. App. 28a) does permit, albeit with caution, rehearing en banc on issues of state law ("Rehearing *en banc* is ordinarily not granted when the only issue is one of state law"). The Fifth Circuit IOP directed to rehearings en banc (Pet. App. F, p. 29a) expressly recognizes conflict between an opinion and "state law precedent" as a basis for rehearing en banc[11].

Finally, there is no requirement of uniformity among the circuits in this area. Taken together, 28 U.S.C. § 46(c), Rule 35 Fed. R. App. P., and this Court's decision in *Western Railway* give the individual courts of appeal broad discretion in the decision to grant or deny en banc hearings.

There is no conflict with other Circuits and certiorari is not warranted on that basis.

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10. Eighth Circuit Rule 35A (App. A hereto) addresses only procedures on such petitions and sanctions.

11. Petitioner omits this standard in his discussion of the IOP in the Petition. Pet. at 6.

D. There Was No Irregularity in the Proceedings.

Petitioner also asserts that the Court of Appeals somehow departed from the usual and accepted course of proceedings. That argument has no merit.

This Court has granted the writ on that basis only in the most extreme cases. For example, in *Khanh Phuong Nguyen v. United States*, __ U.S. __, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (U.S. 2003), review was granted where petitioner's conviction was reviewed by a court which included an Article IV judge.

This is not such a case. The Eighth Circuit proceeded in an orderly fashion to address Respondents' timely Petition for Rehearing. Shortly after Respondents filed their petition for rehearing, and in accordance with Rule 35, Fed. R. App. P., the Court of Appeals requested a response from Petitioner. Petitioner filed his response on February 20, 2002 — well before the Court entered its order granting rehearing en banc on March 26, 2002. Pet. App. L, p. 53a. The en banc decision states bases for the rehearing under both standards of Rule 35, Fed. R. App. P.

The proceedings were orderly and in accordance with the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Eighth Circuit. There was no departure from the accepted and usual course of judicial proceedings. Nothing in the proceedings warrants this Court's intervention by way of a writ on the basis of irregularity.

II. CONCLUSION: THE WRIT SHOULD BE DENIED.

Respondents respectfully urge that the Petition for Writ of Certiorari be denied or dismissed for lack of jurisdiction.

Respectfully submitted,

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